Supreme Court, U.S.
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No. 92-895

In The

Supreme Court of the United States

October Term, 1992

DAVID J. ROUCH,

Petitioner,

v.

ENQUIRER AND NEWS OF BATTLE CREEK, MICHIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITIONER'S REPLY BRIEF AND APPENDIX

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QUESTION PRESENTED

I.

WHETHER THE FIRST AMENDMENT QUESTIONS PRESENTED BY THIS PETITION — THE CONSTITUTIONAL STANDARD FOR APPELLATE REVIEW OF EVIDENCE OF FALSITY AND THE CONSTITUTIONAL STANDARD FOR SUFFICIENCY OF EVIDENCE OF FALSITY IN A DEFAMATION ACTION BROUGHT BY A PRIVATE CITIZEN — WERE PRESENTED TO THE MICHIGAN SUPREME COURT AND DECIDED BY THAT COURT.

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CORRECTIONS TO RESPONDENT'S STATEMENT OF THE CASE

Respondent, in its Brief, makes some new factual assertions which are unsupported by the record. Some of the assertions are characterizations of the record rather than accurate summaries of the record, itself. The Petitioner stands by his initial statement of the case as fully supported by the record, and notes the following corrections to Respondent's assertions.

Respondent asserts at pp. 3-4, and in fn.2 on p. 3 of its Brief that the record shows that the reporter who wrote the defamatory story had talked to "the police" to get the information contained in the story, and that because the trial occurred eight years after he wrote the story he forgot who he talked to. This assertion is a distortion of the record below. The reporter claimed both at his deposition and again at trial, that he was

not uncertain of whom he talked to, rather that he was certain that he talked to one of two police officers, either Chief Bell or Officer Minier. The reporter insisted that he had talked to one of those two officers and that he "relied on the honesty" of Bell or Minier. A-205. The record does not present a question of memory failure of the reporter, Kaufman, but rather of credibility, since both Chief Bell and Officer Minier testified that they never spoke to the reporter, nor would they permit information to be released about Mr. Rouch's arrest because it would have been against departmental policy. A-206-211. The Respondent was unable to produce at trial any police officer who ever confirmed that the reporter based his story about the Petitioner on any official information conveyed by the police.

The Respondent notes in its Brief that the Michigan Supreme Court in its majority opinion found that it was unnecessary to address the question of who, if anyone, supplied the reporter with the information contained in the story. See, fn.14 in decision sought to be reviewed (A-9-10). However, the failure of the Michigan Supreme court to address this credibility question is illustrative of the problem of *de novo* independent judicial review of evidence of falsity where no deference is given to the jury's findings. The jury may have resolved this credibility question against the Respondent, and concluded that the assertions in the Respondent's story that the "police said" that Rouch did certain unspeakable acts in commission of a sex crime and that it "is said" that Rouch performed other criminal acts were not the products of official police statements. A-198. Although everyone assumed the reporter got his information about Rouch's arrest from the police, including the Plaintiff himself, on the record of this case it was never proved that anyone "said" Rouch committed the crime.

The Respondent claims without citation to the record that the judgment in this case "approximated $4,000,000" when the Michigan Supreme Court dismissed the action in the decision now challenged. Resp. Brief, p. 5. This claim is a venture outside the record of this cause; the judgment entered at the time of the jury verdict did not compute interest or costs and its current amount is unknown. A-150.

The Respondent suggests that the Petitioner and many witnesses conceded that the Petitioner was "charged" with a sex crime. Resp. Brief, pp. 5-6. Although witnesses may have used the word "charged" in referring to the arrest of the Petitioner or to statements made by the police, the Petitioner was *never formally charged* by the prosecutor's office with a sex offense. It is the lack of a formal charge by the prosecuting attorney's office that the Respondent's counsel conceded in his closing argument to the jury and Respondent conceded in its published retraction. Respondent prints in its appendix (4a-6a) the argument of its counsel suggesting that the police arrest and Prosecutor's authorization of that arrest presents a basis for an allegation that the Petitioner was "charged," but the Respondent did not print that portion of argument where its counsel conceded there was no formal charge:

> There was no warrant. There were initial kinds of charges that might have been brought in court, but they were not, even though the plaintiff in this case had been charged by the police. (Tr. 1031)

And the Respondent's claims ignore its own retraction wherein the Respondent admitted that the Petitioner "was never formally charged in this case . . ." and that the prosecuting attorney who had approved the arrest

"declined to issue formally a warrant several days later." (A-199) The Respondent found it necessary to correct the false statement in the original defamatory article that "the charge against Rouch was authorized Friday by the Calhoun County Prosecutor's Office," a statement which is admittedly false, and which the jury must have found to be false.

The Respondent would like this Court to believe that the identification of Rouch as the rapist by the babysitter and the two minor children was some sort of a reliable identification, by suggesting that there was a "pre-existing relationship" with Rouch, "enhancing her ability to recognize him." p. 7, Resp. Brief. What the Respondent does not tell the Court is that the "pre-existing relationship" consisted of Rouch picking up the babysitter that evening and dropping her off for her babysitting job at Rouch's ex-wife's home. R.506a. What the Respondent does not tell the Court is that the babysitter initially identified Rouch as the rapist because, even though the rapist wore a ski mask, she thought the voice was similar to that of Rouch's. R.506a. Respondent's characterization of the identification of Rouch as reliable is misleading to the Court. Another man was eventually charged by the prosecution with the rape of the babysitter because the initial identification by an hysterical rape victim was clearly mistaken.

REPLY ARGUMENT

THE QUESTIONS PRESENTED BY THIS PETITION — THE SCOPE OF CONSTITUTIONALLY MANDATED INDEPENDENT APPELLATE REVIEW OF EVIDENCE OF FALSITY AND THE CONSTITUTIONAL STANDARD FOR SUFFICIENCY OF EVIDENCE OF FALSITY IN A DEFAMATION ACTION BROUGHT BY A PRIVATE CITIZEN — WERE RAISED BY BOTH RESPONDENT AND PETITIONER IN THE COURT BELOW AND

FORMED THE BASIS OF THE MICHIGAN SUPREME COURT'S DECISION.

The Respondent in its Brief claims that the Petitioner "waived" one of the questions now presented to this Court, but the Respondent then proceeds to quote from the Petitioner's Brief in the Michigan Supreme Court wherein the Petitioner raised the very question it now raises before this Court. Respondent's Brief, pp. 8-9. Some clarification of how the issues were presented and raised in this case is now required because of the Respondent's Brief.

The questions raised by the Petitioner in this case involve the proper deference to be afforded to a jury's findings when an appellate court conducts the constitutionally required review of evidence of falsity in a defamation case and the constitutional standard for the sufficiency of evidence of "material" falsity in defamation actions brought by private citizens. These issues are federal questions because this Court has held that the First Amendment requires a reviewing court to review jury verdicts in defamation cases to determine whether the verdict was an intrusion into protected speech and because this Court has held that a private citizen has the constitutional burden of proving falsity in a defamation action. Since both of these questions involve appellate review of a jury verdict, the relevant inquiry under Supreme Court Rule 14.1(h) is whether these federal constitutional questions were raised in the courts below in the appeal *after the verdict.*

Since the verdict was favorable to the Petitioner, it was the Respondent who was the appellant in both the appeal to the Michigan Court of Appeals from the trial court's verdict and the subsequent appeal from the Michigan Court of Appeals to the Supreme Court. Therefore, it was the Respondent who presented the issues to

the Court and as the Petitioner has already demonstrated in its Petition for Certiorari and Appendix thereto, the Respondent clearly raised to both the Michigan Court of Appeals and the Michigan Supreme Court the questions of independent judicial review of evidence of falsity in a private citizen defamation action and the sufficiency of evidence of falsity. A-215-218.

The Respondent concedes in its Brief, pp. 7-8, that the question of the scope of independent judicial review of the question of falsity was raised by the Respondent on appeal of this matter in the Michigan state courts. The Respondent also claims that the Petitioner acceded to the scope of review suggested by the Respondent, but an examination of the record discloses that the Petitioner never conceded that the standard of review should permit the court to substitute its judgment for that of the jury, nor did the Petitioner concede that the evidence was insufficient to support the verdict.

The Respondent's argument to this Court regarding Petitioner's "waiver" of the issue of the standard or scope of independent appellate review in defamation cases seems to misapprehend the questions presented to this Court. The question presented to the Court by the Petition for Certiorari is not whether the Court may conduct an independent judicial review of the record for sufficient evidence of falsity, but what deference should be given to a jury's findings when an appellate court conducts its independent judicial review (and when is evidence insufficient of falsity as a matter to support a defamation verdict).

The question of whether judicial review of a defamation verdict requires deference to a jury's findings was not waived by Petitioner in his Brief to the Michigan Supreme Court, but joined, when the Petitioner stated:

> The purpose of independent review is not to usurp the proper function of the jury but to ensure that the plaintiff has presented evidence sufficient to meet its constitutionally mandated burden of proof. Resp. Brief, p. 9; Resp. App., p. 7a)

When the Michigan Supreme Court reviewed the entire record *de novo* with no deference to the jury's special verdict finding "material falsity," the court was not accepting an invitation of Petitioner.

The Respondent does not claim that the question of the sufficiency of evidence was waived by Petitioner. The issue of the sufficiency of the evidence of material falsity was clearly presented by the Petitioner to the Michigan Supreme Court in Petitioner's Brief. See excerpt of Petitioner's Brief in the Appendix to this Reply Brief. A-219.

The suggestion by the Respondent that a footnote in the negligence argument of the Appellee's Brief in the Michigan Supreme Court somehow stands for the proposition that the Petitioner advocated a broad scope of independent judicial review by appellate courts misreads the argument of Petitioner. Resp. Brief, p. 9. The footnote, read in the context of the entire argument, does not advocate a broad scope of judicial review but merely suggests that the Michigan Supreme Court's review should be limited to reviewing the conclusion of the Michigan Court of Appeals, and not necessarily its reasoning.

The Respondent suggests in its Brief that there were independent state grounds on which the decision of the Michigan Supreme Court was based, citing the Court's discussion of several state cases in the fourth section of its opinion. However, the Michigan Supreme Court

clearly stated that its opinion was based on law mandated by the First Amendment of the Constitution of the United States and by the decisions of the United States Supreme Court applying the First Amendment to defamation actions.

In Part III of its opinion (A-12–17) the Michigan Supreme Court announced that it was reviewing the record with regard to falsity because a libel case affects "constitutionally protected public discourse" and such review is necessary "in order to preserve the precious liberties established and ordained by the Constitution," citing *Bose* v. *Consumers Union*, 466 U.S. 485 (1984). A-12. The court goes on to discuss federal constitutional law as enunciated by the Supreme Court in numerous cases, and concludes that there is a "need for independent review grounded on the fear that juries may give short shrift to important First Amendment rights." A-17.

In Part IV of its opinion, where the court considers the sufficiency of evidence of falsity, the Michigan Supreme Court relied on *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. ___, 111 S. Ct. 2419 (1991), and concluded that "the constitutional requirement for testing falsity mirrors Michigan's common law test." A-19.

In concluding that the evidence was insufficient to establish material falsity in Part V of its opinion, when it announced its holding, the Michigan Supreme Court noted that it had reviewed the record in light of "the latest constitutional pronouncements on the subject . . ." A-31.

The Respondent's suggestion that the Michigan Supreme Court applied the proper standard of review and that the standard of review is not in substantial conflict with the decisions of other appellate courts is an argument without merit and without authority. The

Michigan Supreme Court, itself, in the case sought to be reviewed, recognized that it had gone farther in creating independent *de novo* review of falsity than the United States Supreme Court itself had gone. In fn. 20 (A-15), the Michigan Supreme Court gave deference to this Court's decision in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), where the requirement for an independent review of a jury verdict was more narrow than in *Bose* v. *Consumers Union*, *supra*. This conflict in the United States Supreme Court's delineation of what constitutes the proper scope of independent judicial review of falsity was not only recognized by the majority, but also formed the basis of the dissenting opinion of Justice Cavanagh in the Michigan Supreme Court. A-39–42. Justice Cavanagh noted that the United States Supreme Court in *Bose* had proscribed a narrower scope of judicial review than the Michigan Court had adopted (and a narrower scope than other appellate courts have adopted).

The Respondent's attempt to distinguish other appellate cases which have rejected independent, *de novo*, review of a jury's findings of falsity is disingenuous; the Respondent never acknowledges the fact that in each of the cases cited by the Petitioner at pp. 17-18 of the Petition the Courts have expressly declined to extend the doctrine of independent, *de novo*, review as far as the Michigan Supreme Court has in the instant case.

Respondent's Brief does not cite a case to this Court which refutes the assertion that the Michigan Supreme Court is alone in the wilderness in its declaration if its *de novo* review of a jury verdict wherein no deference is given to a jury's findings.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari, and in this Reply Brief, the Petitioner requests that the Petition for Certiorari to the Supreme Court of Michigan be granted.

Respectfully submitted,

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APPENDIX TO PETITIONER'S REPLY BRIEF

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EXCERPT FROM PETITIONER'S BRIEF IN THE MICHIGAN SUPREME COURT, No. 89799, FILED OCTOBER 7, 1991

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